No. 14733

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BERT STRAND, Sheriff of San Diego County, State of California,

Appellant,

vs.

WILLIAM SCHMITTROTH,

Appellee.

Appeal From the United States District Court for the Southern District of California, Southern Division.

BRIEF OF AMICUS CURIAE.

LAUGHLIN E. WATERS,
United States Attorney,

LOUIS LEE ABBOTT,
Assistant U. S. Attorney
Chief, Criminal Division,

JAMES T. BARNES,
Assistant U. S. Attorney,
600 Federal Building,
Los Angeles 12, California,
Attorneys for Amicus Curiae,
United States of America.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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BRIEF OF AMICUS CURIAE.

Statement of Facts.

The petitioner is on probation to the United States Court for the Southern District of California for five years commencing January 17, 1955. [Clk. Tr. p. 22.] On the same day, while in custody of the United States District Court, appellee was seized and arrested by peace officers of the State of California and confined in the County Jail in the custody of San Diego. [Clk. Tr. p. 5.] Said officers of the State of California seized and confined appellee without first obtaining consent of the United States. [Clk. Tr. p. 5.]

Appellant's counsel stated in an affidavit filed in opposition to the Writ of Habeas Corpus that when petitioner was granted probation, "It is apparent that the charge pending against petitioner in San Diego County was not taken into consideration by the Court." [Clk. Tr. p. 16.] No consent to prosecute or incarcerate petitioner was ever obtained from the United States by the State of California. [Clk. Tr. pp. 22-23.] The United States District Court found that no consent had been given by the United States to the State of California to prosecute or incarcerate the federal probationer. [Clk. Tr. p. 5.]

On February 10, 1955, appellee filed his petition for Writ of Habeas Corpus [Clk. Tr. p. 11] alleging that he was unjustly and unlawfully detained by the Sheriff of San Diego County. [Clk. Tr. p. 3.] The petition also alleged that the petitioner pleaded guilty to the offense charged and was placed on five years probation as above alleged. [Clk. Tr. p. 4.] This allegation is admitted. [Clk. Tr. p. 13.]

On February 10, 1955, the Honorable Peirson M. Hall, United States District Judge for the Southern District of California, issued an Order to Show Cause returnable February 17, 1955, and directed the Sheriff of San Diego County to appear in the Federal Court to show cause why the petition should not be granted. [Clk. Tr. p. 12.]

Appellant filed an answer and therein affirmatively alleged, "that detention of the federal prisoner who is subject to the custody of the Federal Court by the State official is not illegal *until such time as the Federal Court*

shall refuse permission for such detention." (Italics ours.) [Clk. Tr. p. 13.]

On February 17, 1955, the Federal District Court, the Honorable Peirson M. Hall, United States District Judge presiding heard appellant's petition for the writ and ordered him discharged forthwith. [Clk. Tr. p. 17.]

At the hearing of the appellee's Petition for Writ of Habeas Corpus, the Court stated with regard to the right of appellee to petition for habeas corpus in the situation in which the Federal Court had not consented to jurisdiction by the State Courts as follows:

> "But nevertheless if we have not consented it seems to me that it is his liberty that is involved and he has the right to bring the petition."

To which counsel for appellant replied:

> "I agree with your thoughts. I think that those cases mean and what I have come in my study of them, I have come to this conclusion that when they say the defendant cannot raise the question, they mean by that that he cannot raise the question in the second sovereignty.
>
> The Court: No, he cannot raise it in the State.
>
> Mr. Brown: In the State right now. In other words, he raised it in the Municipal Court the other day by objecting to the jurisdiction of the Court and his objection was summarily overruled and I think properly so. But I think by the same token that he can raise the question in this Court because who else could? It seems, as your Honor has said, obvious that the defendant must be able to protect himself and if he can raise the question at all he ought to be able to raise it in the Court that will do him some good.

> The Court: He ought to be able to raise it some place and this Court is the only Court where he can raise that.
>
> Mr. Brown: That is right. I think that language is loose in that respect. I think it does apply to the second sovereignty. He cannot raise it in the second sovereignty. The first sovereignty must raise it in the second sovereignty *but the defendant may raise it in the first sovereignty, the way I look at it.*" (Italics ours.) [Clk. Tr. pp. 30-31.]

Appellant stated in opposition to petition for Writ of Habeas Corpus:

> "That the only means by which the people of the State of California may be properly protected in this matter will be to prosecute said William Schmittroth according to the laws of the state." [Clk. Tr. p. 16.]

Under the special terms of probation imposed on petitioner Schmittroth by the Honorable James M. Carter, United States District Judge sitting in for the District Court at Los Angeles, California, the petitioner was to ". . . confine your activities to rural and mountain country. The probation officer will arrange to transfer supervision to the Northern District of California at your convenience." [Clk. Tr. pp. 9-10.]

Jurisdiction.

The jurisdictional basis for the District Court's action was not expressed in the proceedings below. Apparently, however, petitioner invoked the jurisdiction of the District Court. (28 U. S. C. 2243.) It was petitioner's theory that exclusive jurisdiction over the body of the petitioner was in the federal Courts by operation of Sections 3231 and 3651, Title 18, United States Code.

The petition for the Writ of Habeas Corpus was filed on February 8, 1955. The United States District Court ordered the Sheriff of San Diego County to show cause on February 17, 1955, and an answer to the petition for Writ of Habeas Corpus was filed, together with an affidavit in opposition to the petition. [Tr. pp. 12, 14.] On February 17, 1955, the United States, District Court ordered the discharge of the petitioner [Tr. p. 17], subject to the filing of findings of fact. [Tr. p. 31.] The District Attorney of San Diego filed a petition for a rehearing on February 21, 1955. Said petition was denied and findings of fact and conclusions of law were filed on March 11, 1955. [Tr. pp. 22-24.] The judgment was signed and filed on March 11, 1955, and entered on March 16, 1955. [Tr. p. 24.]

Notice of appeal was filed March 16, 1955. [Tr. pp. 25-26.] Thus, this Court has jurisdiction under 28 U. S. C. 2253 to hear and determine this appeal.

ARGUMENT.

I.

Appellant Cannot Complain on Appeal About Petitioner's Standing in Court to Bring a Writ of Habeas Corpus When He Assented Thereto in the District Court.

The record shows that at the hearing for the Writ of Habeas Corpus the appellant's counsel agreed that the petitioner could raise the question in this Court (United States District Court.) [Clk. Tr. pp. 30-31.] He, therefore, waived any objection that he might have had in regard to the petitioner's right to object to the State prosecution by a Writ of Habeas Corpus. He may not, on appeal, raise this objection for the first time. This proposition is supported by the case of *Lloyd v. Webster Apartments Company* (6th Cir., 1943), 135 F. 2d 971, at p. 973, wherein the Court said:

> "The case before us presents no meritorious questions for review. With regard to the orders complained of, appellant, by her acquiesence, personally or through her counsel of record, is bound and now precluded from raising the issues on appeal."

II.

A Federal Probationer May Raise in the Federal District Court the Question of the Power of the State to Prosecute Him Without the Consent of the Federal Authorities.

The appellant cites many cases for the proposition that "the application of the rule of comity is solely a question to be resolved as between the two sovereigns." (App. Br. pp. 4-5.) Of these cited cases, all except the case of

Ponzi v. Fessenden, 258 U. S. 254, had the question of the consent of the sovereign first acquiring jurisdiction raised in the sovereign that acquired jurisdiction second. In the instant case, however, the issue of the first sovereign's consent was raised in the first sovereign's jurisdiction. The propriety of the question being so raised was conceded by the appellant in the trial court. [Clk. Tr. pp. 30-31.]

The question of consent was raised in the sovereignty first acquiring jurisdiction in the case of *Ponzi v. Fessenden, supra;* however, it is to be noted in that case there was express consent by the first sovereign by way of complying with the second sovereign's Writ of Habeas Corpus Ad Prosequendum. In an instance where the sovereign which first acquires jurisdiction expressly consents, as in the case of *Ponzi v. Fessenden, supra,* by compliance with a Writ of Habeas Corpus Ad Prosequendum there is no doubt that it is a question solely between the two sovereigns and the prisoner may not complain.

The question of the first sovereign's consent may be raised by a probationer in the courts of the first sovereign. In the case of *Grant v. Guernsey* (10th Cir., 1933), 63 F. 2d 163, the Court held that a federal probationer could object in the United States District Court by means of a Writ of Habeas Corpus to a State prosecution for a crime he committed before the time he was placed on probation. The County District Attorney opposed and the Justice of the Peace ruled with him and held *Guernsey* to appear at the next term of the State Court.

Guernsey then filed the petition for a Writ of Habeas Corpus in the United States District Court. The writ was granted and the Court said the following, in affirming the order discharging *Guernsey* from State custody, at page 164:

> "There can be no doubt Guernsey was under the jurisdiction of the federal court, subject to its orders under the probation statute at any time; and when the justice of the peace issued his warrant for the arrest of Guernsey and then held him for trial on the state charge and that he abide the judgment of the state court, there was a direct interference with federal jurisdiction, and a violation of the rule of comity between federal and state courts.
>
> "In Taylor v. Taintor, 16 Wall. 366, 370, 21 L. Ed. 287, it is said: 'Where a State court and a court of the United States may each take jurisdiction, the tribunal which first gets it holds it to the exclusion of the other, until its duty is fully performed and the jurisdiction invoked is exhausted; and this rule applies alike in both civil and criminal cases. It is indeed a principle of universal jurisprudence that where jurisdiction has attached to person or thing, it is—unless there is some provision to the contrary—exclusive in effect until it has wrought its function.'
>
> "In Ponzi's Case, *supra,* the court said: 'The chief rule which preserves our two systems of courts from actual conflict of jurisdiction is that the court which first takes the subject-matter of the litigation into its control, whether this be person or property, must be permitted to exhaust its remedy, to attain which it assumed control, before the other court shall attempt to take it for its purpose.' But it was there held that a statute gave to the Attorney General such control of the convict after he was impris-

oned under the sentence as to authorize him to consent to the convict's trial in a state court. No statute is called to our notice, and we know of none, that gives to any officer the right here claimed by counsel representing the state. No application was made to the United States District Judge, and no authority cited holding that he had the power and it was his duty to release control over Guernsey for prosecution in the state court with or without condition that he be released to the federal court after trial in the state court; and if there be that power whether it is an absolute duty or discretionary, and reviewable on appeal. But those questions are not here on the record. Appellee was prosecuted and held under bail bond by the justice of the peace as by claimed right. The county attorney seems to have convinced him that it was by right of comity. The facts justified the issuance of the writ and appellee's discharge. In Taylor v. Taintor, *supra,* it was held that the giving of a bail bond did not discharge a prisoner but only as delivering him into the custody of his sureties. Likewise in Mackenzie v. Barrett (C. C. A.), 141 F. 964, 5 Ann. Cas. 551, and Adamy v. Parkhurst (C. C. A.), 61 F. (2) 517."

III.

The Lack of Objection by the United States Prior to the Time It Had Knowledge of the State Action Does Not Imply Consent.

Appellant contends, "the District Court erred in its failure to attribute any significance to the lack of objection by the Federal Government in the State proceeding. The court's finding of lack of consent by the Federal Government predicated upon such a theory, was errone-

ous." (App. Br. p. 5.) *Amicus curiae* respectfully represents, in reply to appellant's contention, as follows:

(1) The United States did object to the jurisdiction of the State of California by issuance of a Writ of Habeas Corpus.

(2) The presumption in this court is that the ruling of the trial court was correct. *Jernigan v. The Southern Pacific Company* (9th Cir., 1955), 222 F. 2d 245. *Danaher v. United States* (8th Cir., 1950), 184 F. 2d 673. The burden is upon appellant to show error. *Jernigan v. The Southern Pacific Company* (9th Cir., 1955), 222 F. 2d 245. The record fails to disclose any knowledge by the District Court or by any government official of the State proceedings at any time prior to the filing of the petition for the Writ of Habeas Corpus by the petitioner. It also fails to disclose any request for the production of the person of the petitioner in any State actions made to the United States.

It would therefore appear that appellant's contention that "the District Court erred in its failure to attribute any significance to the lack of objection by the Federal Government in the State proceeding" is without merit, in view of the fact that the United States had no knowledge of the State action. The fact that the United States made no objection does not imply consent. One cannot be said to consent to that about which he knows not.

IV.

The State of California May Not Proceed With Its Assertion of Jurisdiction Over a Federal Probationer Without the Express or Implied Consent of the United States.

A second sovereign acquiring jurisdiction over a person, who, is at the time in the custody of another sovereign, may not proceed with its prosecution unless it has express or implied consent of the sovereign who first acquired jurisdiction.

Express consent may be granted by compliance of the sovereign first acquiring jurisdiction with a Writ of Habeas Corpus Ad Prosequendum issued by the second sovereign. Consent may be inferred from acts of the first sovereign: (a) If the first sovereign has notice of the proceeding and refuses to complain; (b) If the first sovereign refuses to issue a Writ of Habeas Corpus upon petition of the person in the first sovereign's custody.

In the instant case, however, there is no showing that the first sovereign knew of the second sovereign's assertion of custody until the matter was presented by the probationer on a petition for a Writ of Habeas Corpus. It surely cannot be contended that the first sovereign impliedly consented to the action of the second sovereign when it never had notice that there was such action.

It is to be noted that the Ninth Circuit has expressed assent to the rule that the second sovereign may not proceed to trial of a person in the custody of another sovereign without the express or implied consent of the first

sovereign. In the case of *Stamphill v. Johnson* (9th Cir., 1943), 136 F. 2d 291, the facts were briefly as follows:

The petitioner was serving a life sentence for a state conviction in Oklahoma when he was surrendered by the Warden of the State Penitentiary of Oklahoma to the United States Marshal for the Western District of Oklahoma for trial in the Federal Court. He was convicted and sentenced by the United States District Court for the Western District of Oklahoma and was incarcerated in the United States Penitentiary, Alcatraz, California. He petitioned the United States District Court for a Writ of Habeas Corpus, the denial of which he appealed to the United States Circuit Court of Appeals for the Ninth Circuit. The denial of the writ was affirmed on appeal, the Court saying in that regard in part as follows:

> "* * * in this case the state authorities did in fact surrender the appellant to the federal authorities, and thus, in effect, gave the federal court jurisdiction to try the appellant and to render judgment against him and to execute that judgment."

On a petition for rehearing the Court gave a *per curiam* opinion in which it discussed the case of *Grant v. Guernsey,* 63 F. 2d 163, as follows, at page 293:

> "In Grant v. Guernsey, *supra,* a majority of the Circuit Court of Appeals of the Tenth Circuit, one judge dissenting, held that a state court could not seize a person who is under probation by reason of a federal judgment during the probationary term and try him for a crime against the state without the consent of the federal court who had custody of him by reason of the probationary judgment and consequently affirmed the discharge of the prisoner. It should be noted that in the Guernsey case the peti-

tioner had been neither sentenced or tried by the state court. He had been held to answer to the state court by a justice of the peace. *This case conforms to the rule announced in our opinion that the consent express or implied of the sovereignty first acquiring jurisdiction and having possession of the person was necessary to a trial in the courts of the other sovereign.*" (Emphasis added.)

V.

The United States Objected to the State of California's Assertion of Jurisdiction by the Issuance of the Writ of Habeas Corpus.

The first sovereign expressed a denial of consent to the second sovereign's action when it issued the Writ of Habeas Corpus. This principle was recognized in the case of *Rawls v. United States* (10th Cir., 1948), 166 F. 2d 532 at page 534, where the court said concerning the case of *Grant v. Guernsey,* 63 F. 2d 163:

> "In the Guernsey case, Guernsey was indicted in the United States District Court for the District of Kansas for Federal law violation. He pleaded guilty and was sentenced to a term of three and one-half years and was then placed on probation for the term of the sentence. While thus on probation, he was arrested by the county attorney of Montgomery County, Kansas, for prosecution in the State Courts. Guernsey protested that he was under the jurisdiction of the Federal Court and that the state action was an interference with the Federal jurisdiction. When this protest was ignored, he began a habeas corpus action in the Court of the Federal Judge who had placed him on probation. The hearing on the petition for the writ was held before the Federal Judge who had placed Guernsey on probation and who had continuing jurisdiction over him. He or-

dered his discharge. Thus it is clear that there was no consent to the surrender of Guernsey to the state by the Federal Judge who continued to exercise jurisdiction over him. On the other hand, it affirmatively appears that the Federal Judge having Guernsey under his jurisdiction objected to the interference with his jurisdiction.

"Even though Guernsey could not himself have challenged the state's violation of the rule of comity in the absence of a consent to a waiver of the jurisdiction of the Federal Court, his petition for the writ did call the violation to the attention of the Federal Judge under whose jurisdiction he continued to remain, and he took appropriate action to register his disproval thereof. He had the power to protect his jurisdiction and could have taken independent action no matter how the violation was called to his attention."

This same principle was recognized in the case of *Lu Woy Hung v. Haff* (9th Cir., 1935), 78 F. 2d 836, the court at page 837 said:

"Appellant relies on Grant v. Guernsey, 63 F. 2d 163, wherein the Circuit Court of Appeals for the Tenth Circuit affirmed the order of the District Court discharging appellee from the custody of the state authorities. In that case appellee had been indicted in the District Court of the United States for Kansas for violation of the National Banking Act and pleaded guilty. He was sentenced to confinement in the penitentiary for a term of three and one-half years, but the District Judge placed him on probation during the term of sentence, requiring the probation officer to report on his conduct every sixty days. Thereafter, during the period appellee was on probation, appellant instituted criminal proceedings

against appellee in the state court, and he was ordered 'to remain there, not depart without leave and abide the judgment of that court.' Appellee petitioned the District Court of the United States for Kansas for a Writ of habeas corpus which was granted, and appellee was discharged. That case is distinguished from the case at bar because there the District Court of the United States which had prior jurisdiction over the appellee in the criminal case refused to relinquish custody of the petitioner to the state court."

VI.

The United States District Court Is Presumed to Have Taken Into Consideration the Facts Before It When It Exercised Its Discretion in Objecting to the State of California's Assertion of Jurisdiction Over a Federal Probationer.

The United States District Court for the Southern District of California did not abuse its discretion by failing to consent to the second sovereign's exercise of its jurisdiction.

The appellant contends that the District Court abused its discretion in that it gave the original probation order no consideration. (App. Br. p. 9.) The record shows that the probation order was before the court at the time that it exercised its jurisdiction. [Clk. Tr. pp. 9-11.] The presumption is that official duty is regularly performed. Therefore, it would be presumed that the District Court took into consideration the facts then before it. The burden is on the appellant to show error. He has made no such showing and therefore, it is to be presumed that the District Court did not err. (*Jernigan v. The Southern Pacific Company* (9th Cir., 1955), 222 F. 2d 245.)

Appellant also contends that the District Court gave no consideration to the fact that no restitution was ordered and, therefore, the District Court was not aware of the petitioner's alleged prior criminal act. (App. Br. p. 9.) The fact that no restitution was ordered does not necessarily show that the District Court was not aware of the alleged prior criminal acts of the appellee when he was put on probation. The fact that no restitution was ordered was before the District Court when it granted the Writ of Habeas Corpus. [Clk. Tr. p. 16.] To not have considered the facts before it would have been error. The appellant makes no showing that there was error and the burden is upon him to so show. In absence of such a showing, the appellate court must assume that the court below acted properly. (*Jernigan v. The Southern Pacific Company* (9th Cir., 1955), 222 F. 2d 245.)

Appellant further contends that the District Court abused its discretion when granting the Writ of Habeas Corpus in that it did not consider that such action might frustrate the state trial and that it might be tried later at the end of probationer's period of probation. The record shows that the District Court took into consideration the fact that the probationer could be tried by the State of California at the end of the five-year probation. (App. Br. pp. 9-10.) In that regard, the Honorable Peirson M. Hall stated "In doing that, I do not think that I am destroying the jurisdiction of the state; I am merely delaying it because, as I view the state's statutes, you can preserve your jurisdiction and preserve the statute of limitations over the defendant by causing him to be indicted by your grand jury and merely holding that indictment until the expiration of the term of his probation." [Clk. Tr. p. 29.]

Appellant also contends that the District Court abused its discretion in not considering the fact that it was of interest to both soveigns to work out their problem in an "orderly fashion." (App. Br. p. 10.) The record shows that at the time the District Court granted the Writ of Habeas Corpus it had before it the fact that the State of California had never made application to the United States for consent to prosecute or incarcerate the federal probationer. [Clk. Tr. p. 33.] It would seem that the proper procedure for a sovereign to take in a case of this nature in the interests of working out the problem in an "orderly fashion" would be to serve a Writ of Habeas Corpus ad Prosequendum on the federal probation officer. It would also seem that this soveregn, who had made no application for consent from the United States and without any consent had seized a federal probationer, should not be heard to complain that the District Court of the United States had not considered the advantage to both sovereigns in working things out in an "orderly fashion."

The appellant further contends that the District Court did not consider whether or not the Writ of Habeas Corpus should be granted and only considered the question of whether or not the petitioner had standing to raise the question of comity and the jurisdiction of the State Court. (App. Br. p. 10.) The record shows that the court had before it the fact that the petitioner was a federal probationer [Clk. Tr. p. 22], and that under the terms of probation he was to confine his activities to rural and mountain country [Clk. Tr. p. 10]; and the fact the State of California had never asked for nor been given permission to prosecute or incarcerate the petitioner. [Clk. Tr. p. 33.] Again the appellant, having

the burden to show error, has failed to show any. In the absence of such a showing, the appellate court must presume that the court below acted properly. (*Jernigan v. The Southern Pacific Company* (9th Cir., 1955), 222 F. 2d 245.)

Conclusion.

It is respectfully submitted that the appellant cannot complain in this Court to the granting of the Writ of Habeas Corpus because he acquiesced in it in the trial court. The granting of the Writ of Habeas Corpus was a proper method for the District Court to refuse its consent to the state prosecution of a federal probationer. Whether or not the Writ should be issued is within the discretion of the District Court. The District Court did not abuse its discretion in issuing the Writ. Therefore, appellant's appeal should be dismissed.

LAUGHLIN E. WATERS,
United States Attorney,

LOUIS LEE ABBOTT,
Assistant U. S. Attorney
Chief, Criminal Division,

JAMES T. BARNES,
Assistant U. S. Attorney,

Attorneys for Amicus Curiae, United States of America.